IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 26, 2009 Session

DORIS G. HOWELL, as Next of Kin and as Guardian of JESSIE J. WILLIAMS, a minor child of GINGER WILLIAMS, deceased, ET AL. v. DAVID M. TURNER, M.D., ET AL.

Direct Appeal from the Circuit Court for Maury County
No. 11471 Jim T. Hamilton, Judge

No. M2008-01588-COA-R3-CV - Filed May 21, 2009

This appeal arises out of the death of Ginger Williams ("Ms. Williams" or "Decedent") after she sought medical treatment from the various Defendants. After the jury returned a verdict in favor of Plaintiff, Defendant Doctor moved for a judgment notwithstanding the verdict, asserting that the doctrine of an independent, intervening cause precluded his liability. We affirm the trial court's decision to deny Defendant's motion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J. and J. STEVEN STAFFORD, J., joined.

Dixie W. Cooper and Chris J. Tardio, Nashville, Tennessee, for the appellants, David M. Turner, M.D., David M. Turner, M.D., PC, David M. Turner, M.D., PLLC and Maury Emergency Physicians, PLLC.

John A. Day, Rebecca C. Blair and Laura W. Bishop, Brentwood, Tennessee for the appellee, Doris G. Howell, as next of kin and as guardian of Jessie J. Williams, minor child of Ginger Williams, deceased and on behalf of Ginger Williams, deceased.

OPINION

Background/Procedural History

Ms. Williams was thirty-four years old and suffered from various health issues including end-stage renal disease, which is commonly known as kidney failure. As a result, she underwent dialysis three times a week, usually on Monday, Wednesday, and Friday, to remove toxins from her body. A typical dialysis session lasts about three to four hours and a good session cleans approximately 30% of the measurable toxins from the blood. Because dialysis removes potassium from a patient's blood, it prevents a patient's potassium from elevating to a life-threatening level that stops the heart. A physician generally tests for an elevated potassium level with a simple blood test, and such a test can be done within a matter of minutes and is typically completed in an emergency department within thirty minutes to an hour.

On December 13, 2004, Ms. Williams visited her nephrologist,[1] Dr. Suellen Lee ("Dr. Lee"), for her regular dialysis . Seven minutes after she began dialysis, she began bleeding around the catheter site. Dr. Lee arranged for Ms. Williams' transfer to the Maury Regional Hospital ("Hospital") emergency room so that they could address the bleeding and stitch the catheter site. Ms. Williams arrived at the emergency room at 4:50 p.m. Dr. David M. Turner ("Dr. Turner" or "Appellant") testified that he assessed Ms. Williams around 5:20 p.m. and then called and briefly spoke to Dr. Lee at approximately 5:45 p.m. An order was entered at 6:28 pm. for blood tests to be done, which included testing Ms. Williams' potassium level. Dr. Turner testified at trial, however, that he did not order any blood tests to be done. From the proof, it is unclear who actually ordered the blood tests and whether Dr. Lee had told Dr. Turner to order the tests.[2] Nevertheless, the parties agree that the order was entered in Ms. Williams' paperwork and in the Hospital computer. Subsequently, Dr. Turner stitched Ms. Williams' catheter site and discharged her around 6:50 p.m. without any blood tests being completed. At 7:00 p.m., Dr. Turner's shift ended and he went home without ensuring that the tests were performed.

At 9:11 p.m. an unidentified Hospital nurse cancelled the order for Ms. Williams' blood tests. At trial, Dr. Turner testified that although nurses can order labs, only physicians could cancel them. No nurse was ever permitted to cancel lab work without getting a physician's order while Dr. Turner worked at Maury Regional Hospital. Dr. Turner also testified that there was a Hospital procedure in place that if critical labs came back after a patient had been discharged, the lab technician calls either the charge nurse, the patient's nurse, or the doctor.

Around noon on December 14, 2004, Ms. Williams' mother, Doris Howell ("Ms. Howell" or "Plaintiff") called Dr. Lee's office and asked if Ms. Williams needed to undergo dialysis because

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[1] A nephrologist is a medical professional who focuses his or her practice on diseases of the kidneys.

[2] Dr. Turner admitted that the nurses completed Ms. Williams' paper work in black ink and everything that Dr. Turner wrote appears to be in blue ink. The mark ordering the blood tests is also in blue ink.

she had not completed her dialysis the previous day. A nurse at Dr. Lee's office advised Plaintiff that Ms. Williams did not need dialysis at that time. Dr. Lee testified that when she spoke to Dr. Turner on the phone the previous day she told him that blood work needed to be done and that Ms. Williams needed to be admitted to the hospital if her labs were not normal. She testified that because Dr. Turner had not called her about any abnormality in Ms. Williams' blood tests, she presumed that Dr. Turner had reviewed the blood test and that it was normal. That evening, Ms. Williams returned to the emergency room where she was pronounced dead. Ms. Williams died from fatally high potassium levels (called hyperkalemia).

Subsequently, Ms. Howell filed this suit on Ms. Williams' behalf against the various healthcare providers. The case was tried from February 25, 2008 through March 11, 2008. After the parties presented the proof, Dr. Turner moved for directed verdict on the issue of superseding cause. The trial court withheld judgment on the motion for a directed verdict and submitted the case to the jury.

The jury returned a verdict in Plaintiff's favor and found Dr. Turner comparatively at fault for Ms. Williams' death. The jury unanimously found that Ms. Williams died of hyperkalemia due to lack of dialysis. It awarded Plaintiff $1,250,000.00 for the life of Ms. Williams, and found Dr. Turner, Dr. Lee, Maury Regional Hospital, and a Hospital's nurse, Jackie Gibbs, to be at fault. The jury determined that Dr. Turner was fourteen percent at fault. The trial court entered the jury's verdict on March 17, 2008, and both parties submitted various post-judgment motions. Dr. Turner filed a Motion for Judgment Notwithstanding the Verdict and/or Motion for New Trial again alleging that he did not proximately cause Ms. Williams' death because the cancellation of the blood tests was a superseding cause. After a hearing on the matter, the trial court denied Dr. Turner's Motion for Judgment Notwithstanding the Verdict and/or Motion for New Trial on June 23, 2008. Only Dr. Turner[3] appeals the judgment of the trial court.

Issues

Dr. Turner has filed a timely notice of review and presents the following issue for our review:

> Whether the trial court erred in denying the Turner Defendants' Motion for Judgment Notwithstanding the Verdict and/or Motion for New Trial[4] because the negligent conduct of the co-Defendant Hospital staff was a superseding cause of the injury, thus exonerating the Turner Defendants.

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[3] This lawsuit was filed against David M. Turner, M.D., David M. Turner, M.D., P.C., David M. Turner M.D., PLLC, and Maury Emergency Physicians, PLLC. The later three represent Dr. Turner's various corporate entities. For clarity, we refer to all simply as "Dr. Turner."

[4] Although, the statement of the issue alleges that the trial court erred in denying the Motion for New Trial, Dr. Turner notes in his brief that he abandoned this argument on appeal.

Standard of Review

A judgment notwithstanding the verdict is a post-trial motion for a directed verdict. *Whaley v. Perkins*, 197 S.W.3d 665, 669 n.3 (Tenn. 2006). It is, therefore, governed by the same standard of review as a directed verdict and is subject to the provisions of Tennessee Rule of Civil Procedure 50. *Id.*; *Mairose v. Fed. Express Corp.*, 86 S.W.3d 502, 511 (Tenn. Ct. App. 2001). Thus, a judgment notwithstanding the verdict is appropriate only when reasonable minds cannot differ as to the conclusions to be drawn from the evidence. *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn. 2006). Upon review, we construe all evidence in favor of the nonmoving party and disregard all countervailing evidence. *Johnson*, 205 S.W.3d at 370. Like the trial court, an appellate court is not permitted to weigh the evidence or evaluate the credibility of witnesses. *Id.*; *see Blackburn v. CSX Transp., Inc.*, No. M2006-01352-COA-R10-CV, 2008 WL 2278497, at *3–4 (Tenn. Ct. App. May 30, 2008) (*no perm app. filed*). If material evidence is in dispute or doubt exists as to the conclusions to be drawn, a motion for a judgment notwithstanding the verdict is properly denied. *Johnson*, 205 S.W.3d at 370.

It is, however, the court's responsibility, not the jury's, to decide purely legal questions, and a trial court may, therefore, direct a verdict as to an issue that can be decided as a question of law. *Filson v. Wells Fargo Home Mortg., Inc.*, No. M2007-01842-COA-R3-CV, 2008 WL 3914899, at *5 (Tenn. Ct. App. Aug. 25, 2008)(*no perm. app. filed*); *Jenkins v. Brown*, M2005-02022-COA-R3-CV, 2007 WL 4372166, at *5 (Tenn. Ct. App. Dec. 14, 2007)(*no perm. app. filed*). When a trial court's decision not to grant a directed verdict is predicated on its determination of a question of law, that determination is subject to later review by the appellate court where the issue has been preserved for review in accordance with the Rules of Civil Procedure. *See Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 130-31 (Tenn. 2004). Our review of the trial court's determination on a question of law is subject to *de novo* review with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).

Analysis

On appeal, Dr. Turner argues that his conduct was not the legal cause of Ms. Williams' injury. In arguing that Plaintiffs failed to establish causation at trial, Dr. Turner does not allege that he was not negligent. Rather, he asserts that the Hospital nurse's conduct canceling Ms. Williams'

tests was a superceding cause[5] and that he, therefore, cannot be held legally responsible for Ms. Williams' death.

It is well-established that a plaintiff seeking to prove negligence must demonstrate: 1) a duty of care owed by the defendant to the plaintiff; 2) conduct falling below the applicable standard of care that amounts to a breach of that duty; 3) injury or loss; 4) cause in fact; and 5) proximate, or legal, cause. *McClung v. Delta Square Ltd.*, 937 S.W.2d 891, 894 (Tenn. 1996). The question whether a duty of care is owed is one of law for the court to determine. *Patterson-Khoury v. Wilson World Hotel-Cherry Road, Inc.*, 139 S.W.3d 281, 285 (Tenn. Ct. App. 2003). The remaining questions whether the defendant has breached his duty and thereby caused the plaintiff's injury are ordinarily matters to be determined by the trier of fact. *Id.* Legal cause concerns a policy decision to deny liability where conduct might otherwise be actionable, and Tennessee courts establish the boundary of legal causation considering logic, common sense, justice, policy, precedent and other ideas of what justice demands and of what is administratively possible and convenient. *Id.*; *Rains v. Bend of the River*, 124 S.W.3d 580, 592 (Tenn. Ct. App. 2003). To prove legal causation, we consider the following three factors: (1) the tortfeasor's conduct must have been a substantial factor in bringing about the harm being complained of, (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence. *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn.

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[5] Appellee makes the following point in her brief:

> Defendant Turner, and indeed much of the case law in Tennessee, uses the terms superseding cause and intervening cause interchangeably. However, the two are distinct. An intervening cause which could have been reasonably foreseen by the first negligent actor or that is the normal response to the first negligent actor's conduct does not break the chain of causation and does not relieve the first negligent actor of liability. Conversely, a superseding cause breaks the chain of legal causation and relieves the original actor of liability.

We, therefore, preemptively clarify the terminology that we intend to use throughout this opinion. Tennessee recognizes the doctrine of an independent intervening cause, and we will refer to it as such. We have on occasion referred to this simply as the "intervening cause doctrine." *See Waste Mgmt., Inc. of Tenn. v. South Cent. Bell Tel. Co.*, 15 S.W.3d 425, 432 (Tenn. Ct. App. 1997). This Court has, however, distinguished an intervening cause from a superceding cause in the following way:

> An intervening act which is a normal response to a situation created by negligence is not a superseding cause and defendant will not be relieved of liability by an intervening cause which could reasonably have been foreseen.
>
> An intervening act of a person, which is a normal response to a stimulant of the situation created by the defendants' negligent conduct, is not a superseding cause of harm to another which the defendant's conduct is a substantial factor in bringing about.

Solomon v. Hall, 767 S.W.2d 158, 161 (Tenn. Ct. App. 1988)(citations omitted); *see also White v. Premier Med. Group*, 254 S.W.3d 411, 417 (Tenn. Ct. App. 2007). We will, therefore, refer to a cause which meets all four of the elements required under the doctrine of an independent, intervening cause as a superceding cause.

1991). Nevertheless, legal causation is "a jury question unless the uncontroverted facts and inferences to be drawn from them make it so clear that all reasonable persons must agree on the proper outcome." *Id.*

One rule or policy that we have held relieves a wrongdoer from liability is the doctrine of independent intervening cause,[6] which breaks the chain of legal causation between the original actor's conduct and the eventual injury. *Rains*, 124 S.W.3d at 592–93; *see Aklladyous v. Gtech Corp.*, No. M2008-00665-COA-R3-CV, 2009 WL 856667, at *4 (Tenn. Ct. App. Mar. 31, 2009). The essential factors necessary to demonstrate a superceding cause are (1) the harmful effects of the superseding cause must have occurred after the original negligence; (2) the superseding cause must not have been brought about by the original negligence; (3) the superseding cause must actively work to bring about a result which would not have followed from the original negligence; and (4) the superseding cause must not have been reasonably foreseen by the original negligent party. *White v. Premier Med. Group*, 254 S.W.3d 411, 417 (Tenn. Ct. App. 2007). If all four elements are met, then the intervening cause is said to be a superseding cause which breaks the chain of proximate causation. Because the superseding cause, therefore, "supplants" a defendant's conduct as the legal cause of the plaintiff's injuries, it relieves the defendant from liability to the plaintiff. *Potter v. Ford Motor Co.*, 213 S.W.2d 264, 273 (Tenn. Ct. App. 2006).

Dr. Turner argues on appeal that the subsequent cancellation of Ms. Williams' blood tests by a Hospital nurse was a superseding cause that should relieve him of liability. He alleges that all four elements of a superceding cause are present in this case. In support of this contention, he explains that the blood tests were cancelled after Dr. Turner's negligence, that Dr. Turner's duty to evaluate and discharge Ms. Williams was a duty separate from the Hospital's duty not to cancel the blood test order, that had the blood tests been completed Ms. Williams would have received dialysis and lived, and that it was not foreseeable that a nurse would cancel an order for lab work, which would be an act of blatant malpractice.

In response, Plaintiff argues that Dr. Turner cannot prove three of the four elements necessary to prove a superceding cause. Plaintiff alleges that Dr. Turner's failure to see that the order for lab work was completed prior to discharging Ms. Williams led to the lab work being cancelled later in the evening. Plaintiff also explains that the same injury resulted from the lab order being cancelled that would have resulted from Dr. Turner's negligence alone. Finally, Plaintiff contends that cancellation of the order for lab work was reasonably foreseeable by Dr. Turner; she explains that human error is always foreseeable.

As is the case with most negligence claims, we find that the dispositive issue is foreseeability. Appellants argue that it is unforeseeable that a nurse would cancel an order for lab work because it

[6] "While other jurisdictions have concluded otherwise, the supreme court has stated that proximate cause and intervening cause remain jury questions in the comparative fault decision-making process." *Waste Mgmt., Inc. of Tenn. v. South Cent. Bell Tel. Co.*, 15 S.W.3d 425, 432 (Tenn. Ct. App. 1997) (citing *Haynes v. Hamilton County*, 883 S.W.2d 606, 612 (Tenn. 1994)).

would be a blatant act of malpractice. The law in Tennessee, however, has never been that it is unforeseeable, as a matter of law, that a medical practitioner commits malpractice. To the contrary, the general rule has been that "if one is injured by the negligence of another, and these injuries are aggravated by medical treatment (either prudent or negligent), negligence of the wrongdoer causing the original injury is regarded as the proximate cause of the damage subsequently flowing from the medical treatment." *Transports, Inc. v. Perry*, 414 S.W.2d 1, 4 (Tenn. 1967). When finding that this common law rule has survived Tennessee's adoption of the comparative fault, we explained that "[t]he rationale for this rule is that the tortfeasor whose negligence caused the injured party to require medical attention should bear all foreseeable risks resulting from the injury, including risks derived from the medical provider's human fallibility." *Atkinson v. Hemphill*, No. 01A01-9311-CV-00509, 1994 WL 456349, at *2 (Tenn. Ct. App. 1994). Thus, it may be foreseeable that a medical professional will act negligently, and we simply cannot agree with Dr. Turner's argument that blatant malpractice is never foreseeable as a matter of law.

In inquiring whether it was foreseeable in this case that a Hospital nurse would cancel Ms. Williams' blood tests, we reiterate that a judgment notwithstanding the verdict is appropriate only when reasonable minds cannot differ as to the conclusion to be drawn from the evidence. *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn. 2006). In addition, the supreme court has explained that "[j]ust as in the case of proximate causation, the question of superseding intervening cause is a matter peculiarly for the jury because of foreseeability considerations."[7] *McClenahan v. Cooley*, 806 S.W.2d 767, 775–76 (Tenn. 1991). Furthermore,

> [t]he foreseeability requirement is not so strict as to require the tortfeasor to foresee the exact manner in which the injury takes place, provided it is determined that the tortfeasor could foresee, or through the exercise of reasonable diligence should have foreseen, the general manner in which the injury or loss occurred. The fact that an accident may be freakish does not *per se* make it unpredictable or unforeseen. It is sufficient that harm in the abstract could reasonably be foreseen.

Id. at 775 (internal citations omitted).

We find that there is a dispute as to the material evidence on superceding cause, specifically whether it was foreseeable that Dr. Turner's failure to ensure that Ms. Williams' blood work was completed could cause her death. First, there was conflicting testimony whether Dr. Turner ordered the blood tests. In addition, we believe that reasonable minds could disagree whether it was foreseeable that a nurse would cancel a lab test after a patient has been discharged or whether it was

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[7] The supreme court recently re-emphasized this point in *Downs v. Bush*. The court of appeals found, as an additional basis for which the trial court properly granted summary judgment, that the plaintiff's act of running into traffic was a superseding cause that relieved the defendants of any liability they may have had to care for plaintiff while he was intoxicated. *Downs v. Bush*, No. M2005-01498-COA-R3-CV, 2007 WL 2471484, at *14–20 (Tenn. Ct. App. 2007). In reversing summary judgment, the supreme court stated that "the jury should decide whether Mr. Downs' act of running into a lane of traffic was an independent intervening cause of his death." *Downs v. Bush*, 263 S.W.3d 812, 825 (Tenn. 2008) (citing *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991)).

generally foreseen that Ms. Williams would not receive the medical treatment that a blood test would have indicated was necessary after Dr. Turner discharged her. Because reasonable minds could differ as to whether cancellation of the blood tests was a superceding cause, we find that this question was properly decided by the jury and it is not our purview to reconsider that determination. We, therefore, affirm the trial court's decision denying Dr. Turner's Motion for Judgment Notwithstanding the Verdict.

Conclusion

For the foregoing reasons, we affirm the judgment of the trial court. Costs of this appeal are taxed to the Appellants, David M. Turner, M.D.; David M. Turner, M.D., PC; David M. Turner, M.D., PLLC; and Maury Emergency Physicians, PLLC and their surety, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE